

FEDERAL EMPLOYMENT LAWS

CIVIL RIGHTS ACT:

Discrimination in employment, whether intentional or unintentional can quickly get an employer into more trouble than he or she can imagine – and very quickly. So it is important for you to understand the Civil Rights Act of 1964 and its amendments.

You will hear about Title VII, or Title III, and on and on. This can be very confusing and what you will learn is that most people who talk about Title this or Title that have little or no idea what the law is about which they are speaking. Most laws passed by Congress are divided into sections or groupings of specific laws. Those groupings of specific sections are generally organized under a heading of “Title.” The first group of laws in a Congressional Act is called Title I, the second group is Title II, and so on. Almost every act passed by Congress, then, has a Title I, a Title II, etc.

To have a little fun with people who are talking to you about a law they refer to as “Title One” or whatever, ask them “Just what Act of Congress is it that you are talking about?” They will probably say something like “You know, Title One.” You just ask them again, “Yes, but Title One of what?” Finally, they will admit that they don’t know title five of what. All they know is “It’s Title One.”

The Civil Rights Act is no different. It too is divided into Titles, and the specific laws included in Title VII (Title Seven) are what you must be concerned about.

What is the law?

Title VII (Seven) of the Civil Rights Act prohibits the refusal or failure to hire, the discharge of any individual, or the discrimination against any individual with respect to compensation, terms of employment, conditions of employment or privileges of employment because of that individual’s race, color, religion, sex or national origin.

Those people to whom the law applies (race, color, religion, sex, or national origin) are referred to as being members of a “protected class.”

Who does it apply to?

The federal Civil Rights Act only applies to those employers who have 15 or more employees. Now you count all employees to see if you meet the 15 minimum number. That is you count electricians, laborers, secretaries, mechanics, etc. - you count them All. Not only that, but to count the number of people working for you, you have to count the people who have been on your payroll, whether they actually worked or not, for each working day of twenty or

more calendar weeks in the current or preceding calendar year. If your turnover is fairly high, you can see that it is pretty easy to hit the magic number of 15.

Most states have similar laws, and each state sets the number of employees that an employer must have before the state law applies to him or her. So, even if you do not meet the requirements under the federal law, you might still be required to follow it because your state law applies to you and likely uses the same wording.

What are the defenses employer's might have?

Employers can select employees on the basis of gender, religion, or national origin when the employer can prove that being of a particular gender, religion or national origin is a "bona fide occupational qualification." Notice this does not apply to race or color! There would probably be very little chance you could win if you discriminated against someone because of their race or color.

This defense of "bona fide occupational qualification" comes only where the employer can prove that business necessity - the safe and efficient operation of the business - requires that employees be of a particular gender, religion or national origin.

Several examples might help you understand this.

You can require that all gym attendants in the girl's locker room be women. That is okay and this is where it would be required that employees be of a particular gender (sex).

If you had an air taxi service and were under contract to fly worshipers into Mecca during Ramadan, you could require that all pilots and flight crew members must be Muslim because only Muslims can come into Mecca during Ramadan.

Seniority rules - use of a company's valid seniority rules (length of service) is okay for promotions, etc. so long as it is applied evenly and fairly across the board to all employees, regardless of race, color, gender, etc.

Types of discrimination:

You can discriminate against someone because of your rules or company policies in two ways: intentional ("disparate treatment") or unintentional ("disparate impact").

Intentional - You can have a rule or policy that discriminates against people of a protected class just because of the way it is worded.

Example: "All women must retire when they reach age 55."

Unintentional - You have a rule or policy that is worded as though it applies to everyone, but in actuality it applies only to someone in a protected class.

Example: “All employees must retire when they reach age 55.” But all employees except one are in their 20s. The one is a black woman who is 54 years and nine months old. The only person who this rule really applies to is the black woman. If there is no reason related to performance of a job for someone to have to retire at 55, this employer is in deep trouble.

If someone (the plaintiff) sues the employer, the plaintiff need show only that the employer uses a particular employment practice that causes a disparate impact on one of the classes of people prohibited by the Civil Rights Act (race, sex, etc.).

If the plaintiff is able to show this, then the employer must prove that the rule complained about is job-related for the position in question, and is consistent with business necessity.

Then, if the employer can prove that, the plaintiff is given an opportunity to prove that an alternative employment practice – one without a disparate impact – is available, and the employer refuses to adopt it, then the employer is in violation of the Civil Rights law.

If the employer can show that his questioned employment practice is sufficiently job-related, and that the Plaintiff has not shown that alternative practices without a disparate impact are available, then the employer should win the lawsuit and be able to continue the “questioned” employment practice.

What is a Disparate Impact?

The complaining employee or hopeful employee (the plaintiff) is required to show statistical evidence of a kind or degree sufficient to prove that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in one of the protected groups.

Example: In other words, as an example, the plaintiff must prove by showing percentages or other statistics that the questioned employment practice kept blacks from being hired or promoted only because the color of their skin was black.

Retaliation:

The Civil Rights Act prohibits employers, unions, etc to retaliate against an employee or job applicant because that person has opposed any practice

that is prohibited by the Civil Rights Act or because that person has taken part in or conducted an investigation in a Civil Rights case.

Affirmative Action:

What is affirmative action?

Affirmative action programs involve giving preference in hiring or promotion to qualified female or minority employees. This usually puts people who are not members of the preferential group at a disadvantage for hiring or promotion

The Civil Rights Act does not require employers to enact affirmative action plans.

Courts have consistently held that remedial affirmative action plans – plans set up to remedy prior illegal discrimination – are permissible under the Civil Rights Act because those plans may be necessary to overcome the effects of the employer’s prior illegal discrimination..

What standards must affirmative action plans meet?

The U.S. Supreme Court has held that governmental programs giving preferential treatment based upon race or color must be justified under a “strict scrutiny” test. Under this test, the government must demonstrate that the program was necessary to achieve a compelling governmental purpose, and the program was narrowly tailored to achieve that compelling purpose.

Gender and Family Discrimination Laws:

Civil Rights Act does permit employers to hire only employees of one sex or of a particular religion or national origin, if that trait is a bona fide occupational qualification. This is narrowly applied by the courts.

Example: Pan American Airways hired only women as stewardesses on their passenger flights. Several men applied for the job as a stewardess and when they were turned down because they were males, they sued. The U.S. Supreme Court said:

“While a pleasant environment enhanced by the obvious cosmetic effect that female stewardesses provide as well as their apparent ability to perform non-mechanical functions of the job in a more effective manner than most men,” men can do the jobs that women stewardesses do and it is sex discrimination to not hire men for stewardesses jobs. Note that today

men and women “stewardesses” on airplanes are now called “flight attendants.”

Courts have also held that the bona fide occupational qualification cannot be based on the “preferences” of co-workers, the employer, clients or even customers.

If an employer refuses to promote a female employee because, despite here excellent performance, she is perceived by co-workers as being too aggressive and unfeminine, the employer is probably in violation of the Civil Rights Act.

An employer may not take a person’s sex into account in making an employment decision, but the employer is free to decide against a woman for other reasons besides her gender (sex).

Equal Pay Act:

This law requires that men and women performing substantially equal work must be paid equally.

Provisions:

A plaintiff claiming violation of the Equal Pay Act must show that the employer is paying lower wages to employees of the opposite sex who are performing equal work in the same establishment.

The law does not require paying equal wages for work of equal value.

Work that is equal involves equal skills, effort, and responsibilities and is performed under similar working conditions.

This law applies only when male and female employees are performing substantially equivalent work.

Equal Work: What is equal work is decided by the courts on a case-by-case basis. A detailed investigation is made into the substantial duties and the facts of each position.

Effort: This involves substantially equivalent physical or mental exertion needed for performance of the job.

Skill: Equal skill includes substantially equivalent experience, training, education, and ability.

Responsibility: Equal responsibility includes a substantially equivalent degree of accountability required in the performance of a job, with emphasis on the importance of the job's obligations.

Working Conditions: The law requires substantially equivalent work be performed under similar working conditions.

Defenses for Employers Under the Equal Pay Act:

The employer is okay if he or she acts under a seniority system, a merit pay system, a productivity-based pay system, or a factor other than sex. Employers must demonstrate that their system is bona fide and applies equally to all employees.

Remedies Under the Equal Pay Act:

An employee or applicant who wins a suit against an employer for violation of the Equal Pay Act may win:

1. Unpaid back wages due (up to two years worth), AND
2. An amount equal to back wages as liquidated damages (unless the employer acted in good faith)

Gender-based Pension Benefits:

Since women do live longer than men, it is okay to require women to pay a higher premium in order to receive the same benefits as men at the same age level.

Pregnancy Discrimination:

Title VII of the Civil Rights Act requires an employer treat a pregnant employee the same as any employee suffering a nonpregnancy-related temporary disability (unless the employer can establish a bona fide occupational qualification for pregnancy-related discrimination). If the employer's sick-leave pay benefits cover temporary disabilities, it must also provide coverage for pregnancy-related leaves.

Pregnancy and Hazardous Working Conditions:

On-the-job exposure to harsh substances or potentially toxic chemicals may pose a hazard to the health of employees. The risk of such hazards may be greatly increased when pregnant employees are exposed to those toxic chemicals.

An employer wishing to avoid potential health problems for female employees and their children may not prohibit women of childbearing age from working in jobs that involve exposure to hazardous substances.

The U.S. Supreme Court has said “women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”

Family and Medical Leave Act:

Which Employers It Applies To:

It applies to employers with 50 or more employees. To be eligible, the employee must have worked at least 1,250 hours of the twelve-month period immediately preceding commencement of the leave.

Key employees are not eligible for the leave. A key employee is any salaried employee who is among the highest 10 percent of employees at a worksite and whom it would be necessary for the employer to replace in order to prevent substantial and grievous economic injury to the operation of the business. If a key employee asks for the leave, the employer must give written notice that he or she is a key employee. If the key employee takes the leave anyway, the employer may deny reinstatement to that employee when he or she tries to come back to work.

What the Law Says:

This law allows eligible employees to take up to twelve weeks unpaid leave in any twelve months because of the birth, adoption or foster care of a child or the need to care for a child, spouse, or parent with a serious health condition, or because the employee’s own serious health condition makes the employee unable to perform functions of his or her job.

Serious Health Condition:

This is an illness, injury or condition that requires inpatient hospital care, or that lasts more than three days and requires continuing treatment by a health care provider, or that involves pregnancy, or a long-term or permanently disabling health condition.

Leave Provisions:

The leave may be taken all at once, or in certain cases, intermittently, or the employee may work at a part-time schedule.

SEXUAL HARASSMENT:

The Equal Employment Opportunity Commission has issued guidelines defining sexual harassment and declaring that sexual harassment constitutes gender discrimination in violation of the Civil Rights Act.

Sexual harassment:

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, where the employee is required to accept such conduct as a condition of employment, where the employee's response to such conduct is used as a basis for employment decisions such as promotion, bonuses or retention, or such conduct unreasonably interferes with the employee's work performance or creates a hostile working environment.

There are two major kinds of sexual harassment:

Quid pro quo harassment – the employee's response to the request for sexual favors is considered in granting employment benefits.

Hostile environment harassment – the employee may not suffer any economic detriment, but is subjected to unwelcome sexual comments, propositions, jokes or conduct that have the effect of interfering with the employee's work performance or creating a hostile work environment.

Factors courts look at to determine if there is sexual harassment:

Courts look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.

Quid Pro Quo Harassment:

To win a lawsuit, the employee must prove:

1. she belongs to a protected group
2. she was subject to unwelcome sexual harassment

3. the harassment was based on sex
4. job benefits were conditioned on the acceptance of the harassment, and (if appropriate)
5. some basis to hold the employer liable.

The essence of this type of sexual harassment is that the employee's submission to such conduct was made either explicitly or implicitly a term or condition of an individual's employment.

Hostile Environment Harassment:

Hostile environment harassment is where the unwelcome harassment has the effect of interfering with the employee's work performance or creating a hostile work environment for the employee.

It does not involve the conditioning of any job status benefit on the employee's response to the harassment.

Test courts apply to determine liability:

Would a reasonable person find the conduct to be offensive and severe enough to create a hostile environment or to interfere with the person's work performance?

Employer Liability for Sexual Harassment:

Employers can be held liable for sexual harassment imposed by their supervisory and managerial employees, by co-workers, and sometimes even non-employees.

Generally, employer liability is determined along standard agency lines.

Agency Relationships:

Whether an agency relationship is created is a question of fact, to be determined by the specifics of a particular situation.

Employer Liability for Supervisors:

An employer is liable for quid pro quo sexual harassment by a manger or supervisor, because such conduct is related to the supervisor's or manager's job status.

Employer Liability for Coworkers and Non-employees:

For both quid pro quo harassment and for hostile environment harassment by non-supervisory or non-managerial employees, an employee will be liable if the employer knew or should have known of the harassing conduct and failed to take reasonable steps to stop it.

Individual Liability:

Individual employees are not liable for damages under Title VII of the Civil Rights Act. So, the individual employees doing the harassing cannot be held liable for their misconduct under the Civil Rights Act. But, they might be liable under various state laws and other federal laws.

EMPLOYER RESPONSES TO SEXUAL HARASSMENT CLAIMS:

Prevention:

The best way for an employer to avoid liability for sexual harassment is to take active steps to prevent it from happening.

Policy against sexual harassment:

It is critical that every employer have a policy against sexual harassment. The policy should define what sexual harassment is (following the EEOC guidelines) and give examples of what is prohibited. The policy should clearly state that the prohibited conduct will not be tolerated from anyone. All violators will be subject to punishment including termination of employment.

The policy should spell out what steps an employee should take if they feel they are the victim of sexual harassment. Notice should likewise be given that the employer cannot take any retaliatory action against any person reporting sexual harassment.

Once established, the employer must enforce that policy. An employer can generally avoid liability if it can be shown that the employer took immediate steps whenever the complaint was filed.

Defenses available to the Employer:

The conduct complained of must be unwelcome and of a sexual nature.

To support a lawsuit, the employee must prove the conduct is not isolated and that it is not trivial in nature for it to be sexual harassment.

Factors the courts consider include its frequency, severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

Unwelcome:

As long as the victim says that the conduct was unwelcome, it is still sexual harassment.

Provocation:

The employer can raise the defense of provocation by showing the alleged victim (the Plaintiff) instigated the allegedly harassing conduct through her or his own conduct by style of dress, comments, and/or conduct.

Example: Where the female employee regularly offered to engage in sexual acts with other employees, and often lifted her skirt to show her supervisor that she was not wearing underclothes, a single attempt by her supervisor to hug and kiss her was not sexual harassment. Again, courts will look to the facts of each individual case.

Conduct of a Sexual Nature:

Tasteless comments or jokes or annoying behavior, while offense might not be sexual harassment. But, harassment based on race, color, religion or national origin can also violate the Civil Rights Act.

Example: A supervisor who is obnoxious and verbally abusive to all employees is not guilty of sexual harassment, as long as the abuse is not based on sex.

Same-Sex Harassment:

The U.S. Supreme Court has held that Title VII of the Civil Rights Act prohibits discrimination because of sex in terms or conditions of employment including sexual harassment by employees of the same sex as the victim of the harassment.

Sexual Orientation or Sexual Preference Discrimination:

Title VII's prohibition on discrimination based on gender does not extend to discrimination against homosexual men or women. Courts have consistently held that Title VII does not protect gay men or lesbian women.

However, a number of State laws do protect homosexuals, whether men or women. Some of those laws specifically provide for protection from harassment because of sexual orientation or sexual preference.

REMEDIES FOR SEXUAL HARASSMENT

Under the Civil Rights Act, courts can issue injunctions to stop harassment and to refrain from such conduct in the future. Courts can also award lost wages and benefits, back pay, seniority, compensatory damages, punitive damages for intentional conduct, legal fees, etc.

DISCRIMINATION BASED ON RELIGION

The Civil Rights Act prohibits discriminating against people because of their religion. The definition of religion is rather broad. It includes "all aspects of religious observance and practice, as well as belief."

The EEOC (Equal Employment Opportunity Commission) has further defined religion to include a person's "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." This applies even when those beliefs are not connected with any formal or organized religion. Atheism is likewise protected by the Civil Rights Act. But a person's political views or social ideologies are not protected.

Religiously Affiliated Schools, Societies, etc.

Religiously affiliated schools, colleges, universities or other educational institutes are permitted to give preference to members of their particular religion in hiring.

The exception in the Civil Rights Act allowing this also applies to religious schools and colleges, all religious societies, religious corporations, religious educational institutions and associations.

Religion as a bona fide occupational qualification:

Religion can be a bona fide occupational qualification exception to the Civil Rights Act, but the employer must prove that business necessity requires hiring individuals of a particular religion.

Example: An employer had a contract with the Saudi Arabian government to fly Muslim worshipers to Mecca. Islamic law prohibits non-Muslims from entering the holy areas of the city of Mecca. The penalty for violating this rule is beheading. It was held that the employer was justified in hiring only Muslims as crew members on the airplanes use to fly the pilgrims to Mecca.

Giving Reasonable Accommodations for Religious Conduct:

An employer is required to make reasonable attempts to accommodate an employee's religious beliefs or practices. But, if such attempts are not successful or involve undue hardship, the employer may discharge the employee.

If there are several ways to accommodate the employee's religious beliefs, the employer is not required to provide the accommodation that is preferred by the employee. The employer has met its obligations under the law when it demonstrates that it has offered a reasonable accommodation to the employee.

DISCRIMINATION BASED ON NATIONAL ORIGIN

Title VII of the Civil Rights Act prohibits employers from discriminating against any applicant or employee because of national origin.

Who is included in the group protected:

The definition of "national origin" includes the place of origin an applicant or employee or his or her ancestors.

The law extends to cover discrimination based upon reasons related to national origin or ethnic considerations, such as:

A person's marriage to a person of, or association with persons of, an ethnic or national origin group,

A person's membership in, or association with an organization identified with or seeking to promote the interests of any ethnic or national origin group.

A person's attendance or participation in schools, churches, temples or mosques, generally used by persons of an ethnic or national origin group, and

A person's name, or the name of the person's spouse, which is associated with an ethnic or national origin group.

Also, an employer can violate the law by discriminating against an applicant or employee whose education or training is foreign, or, conversely, by requiring that training or education be done in another country.

Bona Fide Occupational Qualification:

National origin can be a bona fide occupational qualification in certain cases. To be excused when discriminating on the basis of national origin, the employer must demonstrate that hiring employees of a particular ethnic or national origin is a business necessity for the safe and efficient performance of the job in question.

Disparate Impact:

Employers should avoid arbitrary height and weight requirements of applicants or employees, because such requirements may have a disparate impact on national origin. This is because people of some races are just naturally smaller

English-Only Rules:

An employer can violate the Civil Rights Act by denying employment opportunities because an applicant speaks with a foreign accent or is not able to communicate well in English.

Once again, if the employer can show that the job in question involves public contact, where English must be spoken, then the employer might be justified in requiring that an applicant for that public job must speak English.

An employer is on dangerous grounds to issue a blanket order that only English be spoken at work. There might be justification for requiring English only at certain times (when sales counters are open to the public, for example) or in certain places (public places of the company where customers are).

Citizenship:

Title VII of the Civil Rights Act protects all individuals, both U.S. citizens and non-citizens alike, from discrimination based on race, color, religion, sex or national origin. But national origin discrimination does not include discrimination based on citizenship.

DISCRIMINATION BASED ON AGE

The Age Discrimination in Employment Act of 1967(ADEA) prohibits discrimination against employees aged 40 years and over.

What the law says:

The ADEA prohibits the refusal or failure to hire, the discharge of or any discrimination in compensation, terms of employment, conditions of employment, or privileges of employment because of an individual's age of 40 years or older.

Who it applies to:

The ADEA applies to employers, labor unions and employment agencies with 20 or more employees.

Bona Fide Employment Qualifications:

The Act recognizes that there are sometimes when age is a qualifying factor for a job position. In such cases, it is okay to "discriminate" because of age.

We see this in those situations that are exceptions to the Act (i.e., not covered by the Act).

Exceptions Not Covered by the Act:

Executive employees are exempted from mandatory requirement

Also exempted from the Act are bona fide seniority systems, retirement, pension or benefit systems, etc.

Factors Other than Age:

Employers can differentiate between employees when the differentiation is based on a reasonable factor other than age.

Example: An employer can use a productivity-based pay system, even though this might result in older employees earning less than younger employees because they do not produce as much as younger employees.

Employer is permitted to discipline or discharge employees over 40 for good cause.

Mandatory Retirement:

Employers cannot force employees to retire when they become 65 years old.

Executives can be forced to retire when they become 65 years old, if:

The executive was a bona fide executive or high policy-making position for at least two years, and who upon retirement is entitled to non-forfeitable retirement benefits of at least \$44,000 annually.

Firefighters and Law Enforcement Officers:

States and local governments can set, by law, mandatory retirement ages for fire fighters and law enforcement officers.

Bona Fide Occupational Qualification:

Age can be a bona fide occupational qualification for some jobs.

Examples: Greyhound can refuse to hire applicants over 35 years of age because of passenger safety considerations. Also, a test pilot could not be mandatorily retired at the age of 52.

Workforce Reductions:

Employers seeking to reduce their workforce can offer early retirement incentives, so long as the practice is a permanent practice that is continually available to all who meet the requirements and so long as it is a voluntary program.

Remedies for Violations:

Employees who have suffered from an employer's violation of the ADEA can win in court back wages, legal fees, and liquidated damages if they can show the employer acted willfully.

DISCRIMINATION BECAUSE OF DISABILITY

Americans with Disabilities Act says

It is illegal to discriminate in any aspect of employment because of disability against an otherwise qualified individual with a disability.

The illegal discrimination includes

1. limiting, segregating, or classifying employees or applicants in a way that adversely affects employment opportunities because of disability,
2. using standards or criteria that have the effect of discrimination on the basis of disability or perpetuating discrimination against others,
3. excluding or denying jobs or benefits to qualified individuals because of the disability of an individual with whom a qualified individual is known to associate,
4. failing to make reasonable accommodation to the known limitations of an otherwise qualified individual unless such accommodation would impose an undue hardship,
5. failing to hire an individual who would require reasonable accommodation, and
6. failing to select or administer employment tests in the most effective manner to ensure that the results reflect the skills of applicants or employees with disabilities.

Who the ADA covers:

The ADA covers employers with 15 or more employees.

The ADA does not cover federal or state government employers, Indian tribes or bona fide private membership clubs.

Even if a person has a disability within the ADA, they still must be otherwise qualified for the job in order to be protected by the ADA

The ADA covers “qualified individuals” who have a “disability.” A “qualified individual with a disability” includes an individual who is capable of performing the essential functions of a job with reasonable accommodations on the part of the employer.

Disability defined:

A disability, with respect to an individual, is a physical or mental impairment that substantially limits one or more of the major life activities of such individual, or a record of such an impairment, or being regarded as having such an impairment.

Infectious or contagious disease are disabilities and people with those diseases are protected by the ADA so long as the disease does not present a direct threat to the health or safety of others and the threat cannot be eliminated by reasonable accommodation.

Temporary or short-term non-chronic conditions, with little or no long-term or permanent impact, are usually not considered disabilities.

The disability must preclude an individual from a class or range of jobs, rather than simply disqualifying him or her from a particular or specialized job, in order to substantially limit his or her ability to work.

Burden of Proof:

The person claiming to be qualified has the burden of proving his or her ability to meet all physical requirements legitimately necessary for the performance of the duties of the job.

An employer is not required to hire a disabled person who is not capable of performing the duties of the job, but the employer IS required to make reasonable accommodation to the disabilities of the individual.

Examples of What Are Disabilities:

People who are former drug users or who are recovering drug users are protected by the ADA.

The mere fact that an employee has entered a drug rehabilitation program does not automatically bring that employee within the protection of these laws. The employee must have been drug-free for a significant period of time to be protected under the law.

Examples of What Are Not Disabilities:

Employees who use illegal drugs are not protected by the ADA.

Alcoholics who use alcohol at the workplace are not protected by the ADA

Alcoholics who are under the influence of alcohol on the job site are not protected by the ADA

AIDS:

The definition of contagious disease includes AIDS. AIDS is contagious, but many medical authorities agree that it is not transmitted through the casual contact likely to occur at the workplace.

People who are HIV positive or who have AIDS are protected people under the ADA. Therefore, employers are required to make reasonable accommodation for employees who have AIDS or are HIV positive, so long as the employee is capable of performing the essential functions of the job and do not present a direct threat to the health or safety of others.

The nature of the risk posed by AIDS and HIV depends on the specific job in question.

Corrective, Mitigating, and Remedial Measures:

In determining whether an individual has a disability that substantially limits one or more major life activities, you must consider the existence of corrective, mitigating or remedial measures that may lessen the effect of the disability.

Medical Exams and Tests:

There are restrictions on employers requiring medical exams.

Employers cannot require job applicants to take a physical exam before being considered for the job.

Once an offer of a job has been extended to an applicant, then the employer can require a medical exam, provided such medical exam is required of all entering employees.

Employer's Right to Ask about Existence of Disability:

Employers are prohibited from asking about the existence, nature or severity of a disability.

Employers can ask about the individual's ability to perform the functions and requirements of the job.

Reasonable Accommodations:

Employers have the obligation to make reasonable accommodations for individuals who have disabilities but could do the work with reasonable accommodations on the part of the employer.

Employers must make the reasonable accommodations to permit persons with disabilities to be able to perform the job so long as those accommodations do not impose “undue hardship” upon the employer.

Examples of accommodations that employers should make include access for disabled persons to reach and perform the job, restructuring jobs, providing part-time or modified work schedules, acquiring or modifying equipment, adjusting or modifying examinations, training materials or policies, providing qualified readers or interpreters, etc.

Failure to make such reasonable accommodation (which would not impose an undue hardship), or failure to hire an individual because of the need to make an accommodation for that individual, is illegal discrimination.

Reasonable accommodations include the minimal realignment or assignment of job duties, or the provision of certain assistance devices.

Example: Employer can be required to install amplifiers to telephone headsets for a heard-of-hearing employee.

Drastic realignment of work assignments is not required by the law

Undertakings at severe financial costs to the employer to accommodate disabled persons is not required by the law.

Undue Hardship to Employer:

Employers are not required to make accommodations for individuals when the accommodations would impose “undue hardship on the operation of the business.”

An accommodation imposes “undue hardship” if it requires significant difficulty or expense when considered in light of the following circumstances:

1. the nature and cost of the accommodation needed under the ADA

2. the overall financial resources of the facility involved in providing the reasonable accommodation, looking at the number of persons employed at the facility, the effect on expenses and resources of the employer, the impact the accommodation would have on the operation of the job site.
3. the overall financial resources of the covered employer; the overall size of the business with respect to the number of people employed, the number type and location of the facilities; and
4. the type of operation or operations of the business, including the composition, structure and functions of the work force of the business, the geographic separateness, administrative or fiscal relationship of the facility.

What constitutes an “undue hardship” will vary with the circumstances.

What might not be a hardship to General Motors could very well be a severe hardship to an employer with 20 employees.

Defenses Available to an Employer under the ADA:

1. Direct Threat to Safety or Health of Others.

Employers may refuse to hire or accommodate a disabled person when that disability poses a “direct threat” to the health or safety of others in the work place.

Direct threat is a ”significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”

2. Job-Related Criteria:

Employers can hire, select, or promote individuals based on tests, standards or criteria that are job related or are consistent with business necessity.

Employers could refuse to hire or promote individuals with a disability who are unable to meet such standards, tests or criteria, or when performance of the job cannot be accomplished by reasonable accommodation.

3. Food Handler Defense

An employer in the food service business can refuse to assign or transfer to a job involving food handling any individual who has an infectious or communicable disease that can be transmitted to others through the handling of food, when the risk of infection cannot be eliminated by reasonable accommodation.

4. Religious Entities:

The ADA does not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Example: A church gymnasium operated by a particular church can refuse to hire an individual with a disability who is not a member of that church.

DRUG TESTING

ADA and Rehabilitation Act:

Drug tests are not covered by the ADA. Therefore, the ADA does not prohibit an employer from requiring a drug test. Also, the ADA does not prohibit employers from making decisions of who to hire based on the results of drug tests.

Federal Drug Testing Laws:

Drug testing by employers is not generally prohibited by any federal legislation.

Some federal laws specifically require drug testing (airline pilots, etc.)

Drug-Free Workplace Act is a law of Congress that requires all government contractors doing more than \$25,000 of business annually, and recipients of federal grants of more than \$25,000 to establish written drug-free workplace policies and establish drug-free awareness programs.

State Drug Testing Laws:

Numerous states have passed laws relating to drug testing of employees.

Most state laws set mandatory procedural requirements of employers who subject employees or applicants to drug tests.

Usually, the employer is required to (1) provide employees with a written statement of their drug testing policy, (2) require confirmatory tests in the case of an initial positive test result, (3) allow employees or applicants who have tested positive to have the sample retested at their own expense, and (4) offer employees who test positive the opportunity to enroll in a drug rehabilitation program, and (5) allow termination of employees testing positive only when they refuse to participate in such a rehabilitation program.

Several states even require that employers must have reasonable grounds to suspect that employees are using drugs before they can require drug testing of those employees.

Drug Testing by Private Employers:

Neither the ADA nor Rehabilitation Act prohibits drug testing by employers. Some private employers are required by other federal laws to actually conduct drug testing.

Generally, federal and state laws do not prohibit employers from requiring drug testing, but some states prescribe the procedure under which the tests will be taken and the consequences for a positive test result.

For those union contractors, the collective bargaining agreement with the union may have a provision regarding drug testing. If so, that must be followed, assuming it is not against any law.